BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HEATHER HORNER	)	
Claimant	)	
	)	
VS.	)	
	)	
AMITY HEALTH, LLC	)	
Respondent	)	Docket No. 1,066,998
	)	
AND	)	
	)	
DIAMOND INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 25, 2013, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. Robert R. Lee of Wichita, Kansas, appeared for claimant. P. Kelly Donley of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) ordered an independent medical evaluation from Dr. Prostic to determine his opinion on treatment recommendations and whether the claimant's work activity on or around September 3, 2013, was the prevailing factor for any treatment. The ALJ also ordered respondent to pay the incurred medical bills to date as authorized and to reimburse claimant for the unauthorized medical opinion of Dr. Murati, up to the statutory maximum.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 14, 2013, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the ALJ exceeded his jurisdiction in ordering it to provide medical treatment in the form of payment of medical bills as there has been no determination that claimant sustained a compensable accident. In the alternative, respondent contends the ALJ implicitly found claimant sustained an accident arising out

of her employment. Respondent argues claimant failed to carry her burden of proof that her accident was the prevailing factor for her injury, medical condition, and resulting disability or impairment, and therefore, did not sustain an accident arising out of her employment according to K.S.A. 44-508(f)(2)(B).

Claimant contends respondent's argument is now moot, as Dr. Prostic has since issued his report and a status conference with the ALJ is being scheduled to address Dr. Prostic's opinions. Further, claimant will not seek penalties for failure to pay medical bills unless the ALJ issues another order for respondent to pay all incurred medical. Claimant maintains the Board need not issue an order in this case.

The issues for the Board's review are:

1. Did claimant sustain an accidental injury arising out of and in the course of her employment with respondent?

2. Did the ALJ exceed his jurisdiction by ordering respondent to provide payment of medical bills before finding claimant's accident compensable?

FINDINGS OF FACT

Respondent is the business office for services provided to nursing homes, and claimant was employed as a medical transcriptionist beginning March 18, 2013. In this position, claimant would use the computer to transcribe dictation for physician assistants.

On September 3, 2013, claimant testified she worked a 10-hour day, as it was very busy. Claimant testified her shift included "a lot of moving around, a lot of printing, reaching on the printer, filling up the printer with more paper, a lot of up and down."[1] By the time she left for home, claimant stated her back was sore. She went home and self-medicated with ibuprofen and a heating pad, which relieved her pain.

The next day, September 4, 2013, claimant returned to work, and her back pain returned and became progressively worse throughout the day. Claimant informed Sundra Williams, an LPN at the office, around midmorning that her back was aching. Claimant then left for lunch and made a delivery to a home before returning to the office. By approximately 3:00 p.m., claimant's back pain had worsened. Claimant asked respondent's medical director, Dr. Gregory Lakin, if she could leave the office due to her back pain. Her request was granted.

When claimant returned to her computer to prepare to leave for the day, she suffered a stabbing pain to her back as she started to sit. She testified:

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[1] P.H. Trans. at 6.

> I went to go sit down at my computer to turn everything off and leave for the day. And when I went to sit is when I got a stabbing pain in my back. And I couldn't complete the motion to sit. It stopped me. And so I kind of tried to stand back up. And I couldn't stand fully erect, had to lean over on the desk to hold my upper body up. And I called for somebody and Dr. Lakin and Sundra both came in and tried to help me and move me over to a place where I could kind of sit down and tried to relieve the pain.[2]

Dr. Larkin testified he performed a check of claimant's back while in the office, including questioning claimant regarding the pain location:

> Again, I asked her, you know, do you – where's your pain focused at, where is it tender, where does it hurt. As she was standing, I was palpating down her back, lower lumbar region was tight and it was tender. And that was the extent of it.[3]

Dr. Lakin then provided an injection to claimant's back which did not provide relief. EMS was called at claimant's request, and she was transported to Wesley Medical Center where she remained for two days. Claimant reported she "does occasionally get the back pain like this, but again it is normally relieved with the ibuprofen and heating pad."[4] Claimant indicated she had never experienced pain that severe before the incident. Claimant was diagnosed with intractable back pain and treated with medication and physical therapy. An x-ray of the lumbar spine taken September 4, 2013, revealed no acute fracture or dislocation of the lumbar spine and grade 1 anterolisthesis of L5 on S1. An MRI of the lumbar spine taken the following day revealed mild degenerative changes most prominent at L3-4 and L5-S1, and no fracture or dislocation of the lumbar spine. Claimant was released when she could ambulate.

Claimant began treatment with Drs. Moore and Simon, including medication and physical therapy. She also continued receiving chiropractic treatments for her back, a practice she has maintained since at least 2006. Claimant testified she went to said treatments for routine adjustments and not for the back and hip pain noted in the records. Claimant had received chiropractic treatments in 2013 prior to the incident of September 4, 2013, and treated again on September 9, 2013.[5]

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[2] *Id*. at 10.

[3] *Id*. at 29.

[4] P.H. Trans., Cl. Ex. 1 at 10.

[5] Claimant testified she went to Hancock Chiropractic for chiropractic treatment on September 9, 2013. Respondent's counsel indicated the notes from Dr. Hancock show claimant treated on Wednesday, September 11, 2013. Claimant stated she believed the notes were incorrect.

Dr. Lakin testified claimant had a history of developing physical symptoms in times of work-related stress. He explained he believed claimant's symptoms were amplified by anxiety, and September 2013 was a stressful time at the office. Dr. Lakin stated he was in the midst of investigating the extent of a work-related problem involving claimant at the time of her accident. Dr. Lakin testified claimant had misled and lied to him repeatedly during her employment with respondent.

Dr. Pedro A. Murati, a board certified independent medical examiner, evaluated claimant at her counsel's request on October 15, 2013. Claimant complained of low back pain, the inability to bend her head down completely, the inability to lift or straighten her legs in front of her, the inability to sit for long periods of time due to low back pain, and numbness and tingling in both legs after standing, worse on the left. After reviewing claimant's medical records, history, and performing a physical examination, Dr. Murati diagnosed claimant with low back pain with signs of radiculopathy and bilateral SI joint dysfunction. Dr. Murati imposed temporary restrictions and recommended claimant receive epidural injections, physical therapy, and chronic pain management. Dr. Murati opined:

> She has significant clinical findings that have given her diagnoses consistent with her described multiple repetitive traumas at work. . . . This claimant apparently sustained a structural injury to her low back which resulted in pain necessitating treatment. Therefore, it is under all reasonable medical certainty and probability the prevailing factor in the development of her conditions is the multiple repetitive traumas at work.[6]

Claimant was terminated by respondent and is now employed as a nuclear technician for Cardiovascular Consultants of Kansas.

As a result of the ALJ's Order giving rise to this appeal, Dr. Edward J. Prostic, a board certified orthopedic surgeon, examined claimant on December 20, 2013. Claimant presented with pain in the center and left side of the low back with some radiation to the posterior knee and some numbness and tingling intermittently about the left thigh. Claimant complained of difficulties upon awakening and worsened pain by sitting, standing, walking, bending, squatting, twisting, lifting, pushing, and pulling. After reviewing claimant's medical records, history, and performing a physical examination, Dr. Prostic reported:

> On or about September 3, 2013, [claimant] sustained injury to her low back during the course of her employment. Though her mechanism of injury was not forceful, it is superimposed upon a lady who is significantly overweight and most likely significantly deconditioned. The prolonged sitting made her more vulnerable to a low back sprain and strain. At the present time, there is no evidence of nerve injury. Appropriate treatment is anti-inflammatory and/or analgesic medicines and a therapeutic exercise program. The patient is encouraged to lose weight and get

[6] P.H. Trans., Cl. Ex. 1 at 4.

into aerobic fitness. The work performed on or about September 3, 2013 while employed by [respondent] is the prevailing factor in the injury, the medical condition, and the need for medical treatment.[7]

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-551(i)(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 2012 Supp. 44-534a(a)(2) states, in part:

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. **Upon a preliminary finding that the injury to the employee is compensable** and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. **A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.** Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided

[7] Prostic Report (Dec. 20, 2013) at 2-3.

> in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts. [Emphasis added.]

K.S.A. 2012 Supp. 44-516(a) states:

> In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[9]

ANALYSIS

The ALJ did not issue an Order related to compensability in this case. The issue of whether claimant suffered an accidental injury was not addressed anywhere in the Order giving rise to this appeal. The result of the hearing was an interlocutory Order for an independent medical evaluation, which is within the authority granted to the ALJ by K.S.A. 2012 Supp. 44-516(a).[10] There is no appealable Order to review on the issue of accidental injury arising out of employment.

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[8] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[9] K.S.A. 2012 Supp. 44-555c(k).

[10] *Davenport v. Marcon of Kansas, Inc.*, Nos. 1,034,647 & 1,043,900, 2009 WL 3191384 (Kan. WCAB Sept. 21, 2009); *Scott v. Total Interiors*, No. 244,761, 2000 WL 1134444 (Kan. WCAB July 28, 2000); *Kitchen v. Luce Press Clippings, Inc.*, No. 228,213, 1999 WL 288895 (Kan. WCAB Apr. 2, 1999); *Dodson v. Peoplease*, No. 1,042,494, 2009 WL 1314337 (Kan. WCAB Apr. 9, 2009).

The Board does not have jurisdiction to rule on issues not addressed by the ALJ.[11] The Board is limited on an appeal from a preliminary hearing Order to determine specific identified issues. The Board does not have original jurisdiction to determine matters on an appeal from a preliminary hearing Order, but can only review that which the ALJ has already determined.[12]

Regarding whether the ALJ exceeded his jurisdiction by ordering respondent to provide payment of medical bills before finding claimant's accident compensable, an appealable issue exists. K.S.A. 2012 Supp. 44-551(i)(2)(A) gives the Board jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. K.S.A. 2012 Supp. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified therein.

The plain language of K.S.A. 2012 Supp. 44-534a(a)(2) makes it clear there must be a finding of compensability before an ALJ may order the respondent to pay compensation. This Board Member agrees with respondent that the ALJ exceeded his jurisdiction by ordering payment of medical bills without making a finding that the claim is compensable.

The ALJ need not make a finding of compensability to order an independent medical evaluation. A finding of compensability is not implicit from an Order appointing a medical evaluation pursuant to K.S.A. 44-516.[13] The ALJ was well within his jurisdiction in ordering the independent medical evaluation to determine if the alleged accident is the prevailing factor in causing claimant's medical condition.

CONCLUSION

This Board Member does not have jurisdiction to review the issue of accident arising out of the course of employment because no order to this effect was made by the ALJ. The ALJ exceeded his jurisdiction by ordering respondent to pay medical bills prior to ruling on the issue of compensability.

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[11] *Mezquita v. Tyson Fresh Meats, Inc.*, No. 1,042,398, 2013 WL 4779974 (Kan. WCAB Aug. 16, 2013). See also *Jackson v. Lakepoint Nursing & Rehab*, No. 1,056,279, 2011 WL 5341325 (Kan. WCAB Oct. 18, 2011).

[12] *May v. Presbyterian Manors, Inc.*, Docket No. 1,063,764, 2013 WL 3368496 (Kan. WCAB June 6, 2013).

[13] *Chiles v. Sharpline Converting, Inc.,* No. 1,055,073, 2011 WL 4011690 (Kan. WCAB Aug. 23, 2011); *Myers v. Four B Corporation d/b/a Price Chopper*, No. 1,043,611, 2009 WL 1996487 (Kan. WCAB June 30, 2009).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated November 25, 2013, is reversed in relation to his order for the payment of medical bills, and affirmed in relation to the order for an independent medical evaluation. The respondent is not liable to pay for medical treatment expenses or unauthorized medical expenses until a finding of compensability is made by the ALJ. All other aspects of the Order remain in full force and effect.

Respondent's appeal on the issue of accidental injury arising out of and in the course of employment is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this _____ day of February, 2014.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

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